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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,

vs.

SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit

BRIEF OF THE CURATORS OF THE UNIVERSITY OF MISSOURI AND THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA AS *AMICI CURIAE* SUPPORTING PETITIONER

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BRIEF OF THE CURATORS OF THE UNIVERSITY OF MISSOURI AND THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA AS *AMICI CURIAE* SUPPORTING PETITIONER

This brief is filed on behalf of The Curators of the University of Missouri and The Board of Regents of the University of Nebraska in support of the petitioner. Consent to file this brief has been obtained from counsel for the parties and has been filed with the Clerk of the Court.

INTEREST OF *AMICI CURIAE*

The Curators of the University of Missouri is the legal title of the University of Missouri, the state university of the State of Missouri, which operates two separate medical schools. It was the petitioner in *Board of Curators of the University of Missouri, et al. v. Horowitz,* 435 U.S. 78 (1978), which was concerned with procedural due process requirements of a medical

student dismissed for academic deficiency and which raised but did not directly answer the question of whether federal courts may review such dismissals from a substantive due process standpoint.

The Board of Regents of the University of Nebraska is the legal title of the University of Nebraska, the state university of that State. It operates a medical center which includes a school of pharmacy and is currently involved in litigation filed by a pharmacy student wherein substantive due process is a basic issue. That case is pending before the U.S. Court of Appeals for the 8th Circuit, the student having appealed an adverse decision by the trial court. The case is *Ikpezu v. University of Nebraska,* CV85-1090-NE, pending in the Eighth Circuit Court of Appeals in St. Louis, Missouri.

THE ELEVENTH AMENDMENT IS A JURISDICTIONAL BAR TO A 42 U.S.C. §1983 FEDERAL ACTION SEEKING AN INJUNCTION AGAINST A STATE INSTRUMENTALITY.

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens or Subjects of any Foreign State."

The Amendment was proposed and later ratified by the requisite number of states in direct response to the 1793 decision of this Court in *Chisholm v. Georgia,* 2 Dall. 419, 1 L.Ed. 440 (1793) which held that a citizen of another state could bring an action in federal court against the State of Georgia.

For almost 100 years, the Amendment has been interpreted by this Court to preclude actions brought in federal courts against a state by one of its own citizens. *Hans v. Louisiana,*

134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890) cited with approval in *Employees v. Missouri Public Health Department,* 411 U.S. 279, 280, 93 S.Ct. 1614, 1616, 36 L.Ed.2d 251 (1973).

Although the Eleventh Amendment bars only some actions against state officials, it is a virtually absolute bar to suit in federal court against an unconsenting state, an unconsenting state agency or an unconsenting state department *Pennhurst State School & Hospital v. Halderman,* ____ U.S. ____, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984), without regard to the nature of the relief sought. The only narrow exception is the one recognized by this Court in *Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 552 (1978) and *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976).

In *Fitzpatrick,* Id at 427 U.S. 456, this Court held that

> "... Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."

In so holding in *Fitzpatrick, supra,* the Court closely scrutinized the language and legislative history of the 1972 Amendments to Title VII of the Civil Rights Act of 1964 making the act applicable to state and local governments and determined that the congressional intent to permit private suits against the State as employer was clearly present.

The holding in *Fitzpatrick* that Congress may act pursuant to §5 of the Fourteenth Amendment to subject the State to private suits otherwise constitutionally impermissible implies that not every congressional enactment pursuant to the Fourteenth Amendment wipes away that immunity.

What was implicit in *Fitzpatrick* was certainly explicit in *Quern v. Jordan,* 440 U.S. 332, 345, 99 S.Ct. 1139, 1147, 39 L.Ed.2d 358 (1979). Referring to 42 U.S.C. §1983, the Court held:

> "§1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States."

Relying heavily on *Alabama v. Pugh,* 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978), the Court determined in *Quern v. Jordan, supra* at 440 U.S. 341, 99 S.Ct. 1145, that the statutory language and legislative history was insufficient to conclude:

> "that Congress intended by the general language of §1983 to override the traditional sovereign immunity of the States."

Thus, it is clear that Congress did not abrogate the States' Eleventh Amendment immunity by the passage of 42 U.S.C. §1983.

The jurisdictional bar to suit in federal court against an unconsenting state applies both to suits at law and suits in equity. *Missouri v. Fiske,* 290 U.S. 18, 27, 54 S.Ct. 18, 21, 78 L.Ed.145 (1933) cited with approval in *Pennhurst, supra; Alabama v. Pugh,* 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978).

In *Alabama v. Pugh, supra,* this Court reversed a judgment in a §1983 action which enjoined the State of Alabama and the Alabama Board of Corrections as well as various state officials. In so doing, the court distinguished between suits brought against the state and suits brought against state officials and held:

> "There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit." *Alabama v. Pugh,* 438 U.S. at 782, 98 S.Ct. 3057 (1978)."

Because it is clear under *Pennhurst* that the Eleventh Amendment immunity protects an unconsenting state, its agencies and departments from private suits in federal court in injunctive actions as well as those seeking monetary relief and under *Alabama v. Pugh* that Congress did not abrogate that immunity by enactment of 42 U.S.C. §1983 *Alabama v. Pugh, supra,* it is clear that Petitioner's contention on the Eleventh Amendment issue is correct if:

1) Petitioner, Regents of the University of Michigan, is the alter ego of the State for purposes of Eleventh Amendment immunity (which Respondent does not dispute); and

2) Petitioner has not waived its Eleventh Amendment immunity.

In considering the second issue, we would respectfully urge this Court to adhere to the teachings of *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275, 277, 79 S.Ct. 785, 787, 3 L.Ed.2d 804 (1959) that "where a public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal courts."

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT REQUIRE SUBSTANTIVE REVIEW OF A STUDENT'S ACADEMIC PERFORMANCE

The courts of this nation, whether federal or state, have consistently deferred to the expertise of professionals in education on matters involving evaluation of a given student's academic progress and achievement. This is particularly true in higher education and indeed must continue to be so if we are to maintain the quality of education which this nation expects and deserves. It has been stated that: "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraints. . . . By and large, public

education in our Nation is committed to the control of state and local authorities." *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968). This quotation was used by the Supreme Court in the decision in *Board of Curators of the University of Missouri, et al. v. Horowitz,* 435 U.S. 78 (1978), and in so quoting it held that there was no reason to intrude on that historic control in that case. It is respectfully submitted that the same deference to the same historic control is called for in the case at bar.

In *Horowitz* the Court extensively addressed the issue of procedural due process in academic dismissal cases. Since that decision various courts have faced the issue of what impact, if any, *Horowitz* has upon substantive due process under the Fourteenth Amendment in academic dismissals. Their decisions do not agree as to whether a student who has been dismissed for academic deficiences from a public institution of higher education has an actionable substantive due process claim. See *Hines v. Rinker,* 667 F.2d 699 (8th Cir. 1981), *Stevens v. Hunt,* 646 F.2d 1168 (6th Cir. 1981), *Lavash v. Kountze,* 473 F. Supp. 868 (D. Mass. 1979), *Hubbard v. John Tyler Community College,* 455 F. Supp. 753 (E.D. Va. 1978), *Watson v. University of South Alabama College of Medicine,* 463 F. Supp. 720 (S.D. Ala. 1979), and *Aubuchon v. Olsen,* 467 F. Supp. 568 (E.D. Mo. 1979).

But *Horowitz* stated:

> "In reversing the District Court on procedural due process grounds, the Court of Appeals expressly failed to 'reach the substantive due process ground advanced by Horowitz,' 538 F.2d at 1321, n. 5. Respondent urges that we remand the cause to the Court of Appeals for consideration of this additional claim. In this regard, a number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if 'shown to be clearly arbitrary or capricious.' . . . Even assuming that the courts can review under such a standard an academic decision of a public educational institution,

> we agree with the District Court that no showing of arbitrariness or capriciousness has been made in this case. Courts are particularly ill-equipped to evaluate academic performance. The factors discussed in Part II with respect to procedural due process speak a fortiori here and warn against any such judicial intrusion into academic decision-making." P. 91.

The Court thus most appropriately concluded that the courts are ill-equipped to evaluate academic performance and refused to engage in the process of second-guessing a qualified faculty of a medical school. The Court certainly did not state that there is a legal right for a student to have the courts review academic evaluations. It only reported the dictum of a number of lower courts which implied but did not hold that such a dismissal might be enjoined if it were shown to have been arbitrary and capricious.

The institutions submitting this brief suggest that, in cases involving dismissals for academic performance, the line between procedural and substantive due process disappears. *Horowitz* suggested as much in the above quotation. The very touchstone of due process is fairness, but neither fairness nor the Fourteenth Amendment extends to a student the right to have a court reevaluate his/her academic performance. A student who has been treated fairly, as in *Horowitz,* has received appropriate constitutional protections; thus, to review the fairness of the procedures used will reveal the rational basis for the decision itself. There is no dispute concerning the fairness of the procedures in the case at bar. Countless hours were spent by Petitioner's faculty evaluating Respondent's performance and carefully considering his explanations of his academic deficiencies.

For those who read *Horowitz* as sanctioning substantive due process review, the most that can be said of the case is that it set the standard of review to be simply whether the decision to dismiss a student was arbitrary or capricious. If a dismissal is

reviewed under such a standard, it should be incumbent upon a student to prove that the decision lacked any rational basis and was motivated by factors unrelated to academic performance. See *Hines v. Rinker,* 667 F.2d 699 (8th 1981), *Stevens v. Hunt,* 646 F.2d 1168 (6th 1981), *Lavash v. Kountze,* 473 F.Supp. 868 (D. Mass. 1979), *Gaspar v. Bruton,* 513 F.2d 843 (10th Cir. 1975), *Greenhill v. Bailey,* 519 F.2d 5 (8th Cir. 1975), *Horowitz v. Board of Curators of the University of Missouri,* 447 F. Supp. 1102 (W.D. Mo. 1975). Even if one assumes this standard of review to be appropriate, it is submitted that, "Respect for the discretion of those best qualified to make such judgments dictates that the Medical School and not the federal courts should determine the qualifications of appellant (student) to continue his medical studies." *Hines v. Rinker,* at p. 704. Faculties of institutions of higher education *must* employ subjective judgment in evaluating academic performance and the Supreme Court in the *Horowitz* decision recognized the necessity of and judicially approved such evaluation. To hold that under the guise of substantive due process a court can reevaluate, de novo, academic performance is in essence saying that use of subjective judgment is presumed suspect and higher education must be restricted to academic evaluation by objective standards. No court has ever gone this far in an academic dismissal case except the Court of Appeals in this case.

To require such review of an academic dismissal decision will put courts on the horns of a dilemma in that they have always deferred to the professional judgment of faculties. If one recognizes another's expertise it is extremely difficult, if not impossible, to review the expert's decision to see if it is correct.

It is therefore respectfully submitted that the due process clause of the Fourteenth Amendment does not call for a substantive review of an academic dismissal and that evaluation of academic performance should remain exclusively with the faculty of an institution of higher education.

This is particularly true in the case at bar since there was no showing that Respondent had been dismissed for invidious non-academic reasons, such as race or sex. The district court, just as did the district court in *Horowitz,* explicitly found that the decision to dismiss Respondent was not arbitrary or capricious. That finding was not clearly erroneous. This court in *Anderson v. City of Bessemer City, North Carolina,* No. 83-1623, 53 L.W. 4314, decided March 19, 1985, prescribed the appropriate standard of appellate review and discussed in that opinion the 'clearly erroneous' rule:

> ". . . a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." 53 L.W. 4317.

In the case at bar the trial judge made several specific findings of fact, including that the dismissal decision was not arbitrary or capricious. The Court of Appeals concluded that the trial court was in error entirely because of the single fact that the student was the only medical student not allowed to retake Part I of the medical examination known as NBME Part I. The Court of Appeals thus made a substantive academic decision which is reversible because it ignored Respondent's numerous academic deficiencies and also because it misapplied the clearly erroneous standard for appellate review.

CONCLUSION

It is respectfully requested that the Court reverse the decision of the Sixth Circuit Court of Appeals for the reasons hereinbefore set forth.

Respectfully submitted,

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